a hearing to a person charged with such offense.[24] The recent case in North Dakota[25] which construed a statute authorizing a Dairy Commissioner to revoke the license of the owner of a creamery "on conviction" or "on evidence" of the misreading of a cream test as permitting the revocation of the license on the *ex parte* report of an inspector, without notice or hearing to the licensee, seems therefore contrary to principles of due process.

E. M. B.

SOME EFFECTS OF A PARTIAL ASSIGNMENT OF A CHOSE IN ACTION

It has been said that "the partial assignee of a chose in action acquires no rights at common law."[1] Doubtless in making this statement Dean Ames had in mind the relation of the partial assignee to the debtor. Thus interpreted his statement is for most jurisdictions a correct statement of the law, although, as the present writer has elsewhere pointed out,[2] there are states in America in which assignees may enforce their claims against the debtor in "courts of law."[3] If, however, we examine the relations between the partial assignee and his assignor, we discover the need of limiting or at least explaining Dean Ames's statement. It seems clear that a partial assignment fairly implies an agreement in fact by the assignor to refrain from collecting from the debtor the portion assigned. If so, obviously the common law may attach to this agreement a contractual duty. The cases so hold.[4] As against the assignor, therefore, the partial assignee

[24] *People ex rel. Loughran v. Flynn* (1905, N. Y.) 110 App. Div. 279, 96 N. Y. Supp. 655 and cases there cited. Even the existence of an emergency would seem, properly, to justify only summary *suspension* of the license until a hearing had been had.

[25] *Cofman v. Osterhous* (1918, N. Dak.) 168 N. W. 826. Nor is the conclusion altered by the fact that the licensee requested and obtained a hearing from an officer having no authority to review the ruling of the authorized officer.

[1] Ames, *Cases on Trusts* (2d ed.) 63.

[2] (1917) 30 HARV. L. REV. 482.

[3] In a code state like New York, or any state in which "common law" and "equity" are administered by the same tribunals, the term "court of law" can mean nothing more than the tribunal sitting with a jury in cases which, before the consolidation of law and equity, were heard in "common law courts"; and "court of equity" can mean nothing but the same tribunal sitting without a jury for the hearing of cases formerly cognizable in Chancery in the exercise of its "equitable" jurisdiction. The absence of a jury in the "equity" cases has the farther result that the appellate tribunal reviews the findings of fact of the "equity court" in a manner different from that in which it examines a jury's verdict. So long, however, as by constitution or statute we insist that the facts in all cases which historically were "common law" cases shall be found by a jury, and in all "equity cases" by the judge, we shall preserve that relativity of law which the consolidation of the two courts sought to abolish.

[4] *Eaton v. Mellus* (1856, Mass.) 7 Gray, 567; *Hubbard v. Prather* (1808, Ky.) 1 Bibb. 178; 5 C. J. 968, n. 56.

acquires at least this one right which is recognized by the common law court. Be it noted that this right is not "exclusively legal"; it is "concurrent," *i. e.*, concurrently legal and equitable.[5] Does the partial assignee by virtue of the assignment acquire other legal relations which are concurrent and not exclusively equitable? This problem is involved in the case of *Hinkle Iron Co. v. Kohn* (1918, N. Y. App. Div.) 171 N. Y. Supp. 537. In that case a written partial assignment of a money claim against a city was made by a corporation, acting through its president. The parties orally agreed, however, that the assignee was not to notify the debtor of the assignment, that the assignor should collect the whole, and that "as soon as the corporation received" the amount of the debt from the debtor "the amount so assigned would be paid" to the plaintiff.[6] The president of the corporation collected the whole sum, receiving a warrant therefor, payable, apparently, to the order of the corporation. This warrant he deposited in the corporation's bank account and then used the funds for corporation expenses. The corporation became bankrupt and the partial assignee then brought an action for "conversion" against the president of the corporation. A recovery was denied, one of the five judges dissenting. It is proposed to examine the soundness of this conclusion.

Apparently the result reached by the majority is based partly upon what seems to be a misinterpretation of the agreement of the parties. Their view seems to be that all that was promised by the defendant was to pay the assignor as soon as the money was collected, and not pay him out of *the funds received from the debtor*. Such a view, it is submitted, makes the assignment a legal nullity. Fairly interpreted, the agreement of the parties—if we give effect to all parts of it—seems to be that the assignor shall act as a collecting agent for the partial assignee as undisclosed principal, paying over to the latter as soon as collected the share of the funds to which he is in equity entitled. Clearly, if a partial assignee himself collects his share, the money received is his, both at "common law" and "in equity." Equally

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[5] A "legal relation" which is recognized as valid only by the common law and which is in conflict with a paramount equitable relation is not—as a matter of genuine *substantive* law,—a genuine legal relation, although it may have certain procedural effects. All genuine legal relations are either (1) "concurrent" or (2) "exclusive." The former are recognized as valid by both "law" and "equity," *i. e.*, they are concurrently legal and equitable; the latter are vindicated and sanctioned exclusively by equity, *i. e.*, they are exclusively equitable. Wesley N. Hohfeld, *The Relations between Law and Equity* (1913) 11 MICH. L. REV. 537; Walter W. Cook, *The Alienability of Choses in Action* (1917) 30 HARV. L. REV. 449, 455-459.

[6] The case does not give the exact language used. The quotation is from the opinion of the majority. The dissenting judge says the agreement was that when the money was paid the amount assigned "should be taken therefrom and paid to the plaintiff."

obvious is it that if the assignor had in the principal case disclosed the fact of his agency to the debtor, the funds collected by him would, to the extent of the assignment, have been held by him as a fiduciary.[7] Had he received money, he would have been a common law fiduciary, as would any other agent who collects money for a principal, and the assignee would have had a "concurrent" interest in the money received. Doubtless as a common law fiduciary he would have been privileged to deposit the money in a bank if unable to pay it over immediately,[8] and to draw out from the bank the corporation's share; or, before deposit, to sever and use the corporation's share—always, however, leaving a portion large enough to satisfy the assignee's claim. If, on the other hand, he were to use the whole sum received he would clearly be guilty of a conversion.[9] Would the fact that the debtor did not know of the agency alter these relations between the partial assignee and the assignor? Surely not.[10] Had the payment been in money, then, it seems that the defendant would clearly have been liable for a conversion.

The only doubtful point in the case is due to the fact that the payment was made by a warrant and not in cash. This warrant was, it seems, payable to the order of the corporation. According to the agreement—as we have interpreted it—the latter held this warrant in a fiduciary capacity. While doubtless the corporation was privileged to collect the money due on the warrant, or to deposit the warrant in a bank, it seems that it was under a duty to retain and pay over a proper share of the proceeds of the warrant to the partial assignee. Was this duty exclusively equitable, or was it "concurrent," *i. e.*, one which a court of law as well as the chancellor would recognize and sanction? It may be argued with force that according to the older law the fiduciary relation would be only that of equitable trustee and *cestui*, and that therefore an action for "conversion" would not lie. But it is believed that this argument fails to take account of two facts: (1) that in the progressive development of our legal system many

[7] The common law, as well as equity, had its fiduciaries: bailees, against whom detinue lay; and guardians, "bailiffs" and "receivers," against whom the action of account could be brought. The best discussion of these is in Langdell, *Brief Survey of Equity Jurisdiction*, 75-85.

[8] This distinguishes the common law "bailiff" and "receiver" from the mere bailee, who must turn over the specific thing received. All three are alike in that they receive possession of goods or money not their own and in a fiduciary capacity. Langdell, *op. cit.*, 76-77.

[9] *Wells v. Collins* (1889) 74 Wis. 341, 43 N. W. 160; Mechem, *Agency* (2d ed.) sec. 1256.

[10] That is, as between the parties. It has even been held that where an agent for an undisclosed principal buys chattels with the latter's money, the chattels "belong to the principal" even as against innocent third persons who subsequently purchase the goods from the agent for value and in the belief that the agent owns them. *Kempner v. Dillard* (1907) 100 Tex. 505, 101 S. W. 437.

duties and other legal relations which formerly were exclusively equitable have become "concurrent"; (2) that in New York, where the principal case was decided, all courts are courts of both "common law" and "equity" and that this has hastened the transformation of exclusively equitable jural relations into "concurrent" relations vindicated and sanctioned by both courts.[11] For that reason many of the older notions are no longer law.[12] For example, as bearing directly upon the immediate question, consider the decisions in New York that "trover" for "conversion" will lie against a factor who has sold goods on commission and does not, after deducting his commission, pay the proceeds over to his principal—all without any discussion of whether the factor received payment in money or in a check or bank draft payable to his own order.[13] In the latter case, according to older notions, while the factor might be liable as a "bailiff" in the common law action of account,[14] his principal could not recover for conversion of the check or bank draft, for the "legal title" to that was clearly in the factor. If the principle involved in these cases relating to factors is to be followed, there is no reason why a code action at law for damages should not be allowed against the corporation, even though the complaint describes the wrong as "conversion." If an action of this kind would lie against the corporation, it would on well-recognized principles lie against the defendant, who as president did the actual "converting." It is believed, therefore, that the conclusion reached by the dissenting judge is preferable to that of the majority of the court.

W. W. C.

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[11] This does not mean that a "concurrent" right, for example, gives the holder his option of suing on it either at law or in equity. The refusal of equity to enjoin the enforcement of a right in the common law court is a recognition of its validity so as to make it "concurrent" within the meaning intended to be conveyed by that term.

[12] Under the influence of code procedure facts which were formerly a ground for relief in equity way of injunction and a decree for a conveyance of the outstanding "bare legal title" are to-day frequently held to constitute "legal defenses," *i. e.*, they may be set up by way of answer merely instead of by counterclaim. Illustrations are: *Lindell v. Lindell* (1917) 135 Minn. 368, 160 N. W. 1031, commented upon in (1917) 26 YALE LAW JOURNAL, 592; *Chicago & N. W. R. Co. v. McKeigue* (1906) 126 Wis. 574, 105 N. W. 1030. Indeed, is not every case in which a "common law" count for "money had and received" is allowed against a "constructive trustee" an illustration of the transformation of an exclusively equitable jural relation into one which is "concurrent"?

[13] *Britton v. Ferrin* (1902) 171 N. Y. 235, 63 N. E. 954. Under the New York law a factor is a fiduciary, in the absence of agreement to the contrary. This view is apparently not that of all jurisdictions. While a fiduciary when the proceeds of his principal's goods are first received, he is usually regarded as authorized by business usage to appropriate the proceeds and become a mere debtor. Mechem, *Agency* (2d ed.) sec. 2543.

[14] *Godfrey v. Saunders* (1770, C. B.) 3 Wils. 73.